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IN THE

Supreme Court of the United States

No. Term,

HARRY J. ALKER, JR., AND MAMIE DUBAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF ALFRED A. DUBAN, DECEASED,

Petitioners and Appellants Below,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States:

The petitioners, Harry J. Alker, Jr., and Mamie DuBan, individually, and as Executrix of the Estate of Alfred A. DuBan, deceased, respectfully petition this Honorable Court for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit, and respectfully show:

Summary Statement of Matters Involved.

This is a suit in equity brought in the United States District Court for the Eastern District of Pennsylvania by Federal Deposit Insurance Corporation, a corporation, Respondent herein, against Harry J. Alker, Jr., and Mamie DuBan, individually, and as Executrix of the estate of Alfred A. DuBan, deceased (petitioners herein); and National Dairy Products Corporation, to secure a deficiency judg-

ment against Alker upon a promissory note and to compel the National Dairy Products Corporation to transfer to Federal Deposit Insurance Corporation as owner 4400 shares of National Dairy Products Corporation stock claimed by Mamie DuBan as Executrix of Estate of Alfred A. DuBan, deceased, and to pay Federal Deposit Insurance Corporation all dividends on said stock since November 20, 1942. The United States District Court decided in favor of the plaintiff, entered judgment against Alker for a deficiency of $117,581.35 with costs, and directed National Dairy Products Corporation to make the said transfer and pay over the said dividends. An appeal was taken from the judgment by Alker and Mamie DuBan, individually, and as Executrix, to the United States Circuit Court of Appeals for the Third Circuit, which affirmed the judgment of the United States District Court.

The facts relating to the note and collateral are these:

In 1929 Alker, a lawyer, one of the petitioners, borrowed about $600,000. from the Integrity Trust Company, giving his note therefor, and as security various collateral. Later the bank split the loan and had Alker execute on May 26, 1931, two demand notes in favor of the bank, one for $350,000. and one for $242,150., the securities remaining as collateral for the two notes. In September, 1931, the bank demanded additional collateral. Alker was not able at the time to deposit more collateral, but a friend Alfred A. DuBan agreed to put up 1,000 shares of National Dairy Products Corporation stock provided the bank and Alker would work out some arrangement whereby there would be no more demands for additional collateral, and the entire collateral would not be disturbed until financial conditions improved so that all parties would get out without any loss. It was finally orally agreed between the Integrity Trust Company, acting by its Executive Officers, on the one hand, and DuBan and Alker, on the other, that the bank would make no demands for additional collateral and the loan would not be disturbed, but would remain in status

quo, until the equities of all persons had been worked out, provided DuBan put up the 1,000 shares of stock—then worth a considerable amount—and provided also that Alker assign a number of very substantial legal fees, earned but not yet paid, would secure and maintain $100,000. additional life insurance on his life in favor of the bank, (it already holding a $25,000. policy on Alker's life), and continue to pay the premiums on the insurance and the interest on the loan. The stock was put up, the extra insurance taken out, and the fees assigned. All the premiums on the insurance have been paid by Alker and he has also regularly paid or tendered the interest on the loan to date. One of the active directors and members of the Executive Committee of the bank testified to the agreement and that the same came before the Executive Committee and the Board and was approved. He also testified it came a number of times later before the Executive Committee, or the Board, and in each instance the agreement was re-affirmed.

In 1936 a Bank Examiner advised the bank it should secure a new note as the original notes were more than five years old. Alker, at the request of the bank, executed a new note in favor of the bank on December 11, 1936, for $564,367.31, (the face of the notes having been reduced to that amount), the new note reciting specifically it was in substitution for and continuance of the pre-existing notes as to which the agreement had been made. There was no concealment or attempt at concealment. The transaction was as much for the benefit of the bank as for the benefit of Alker.

In 1936, the insurance policies were renewed for a ten year period, the details therefor having been arranged by the trust company. The new policies arranged for by the trust company expire at the end of 1946.

In January, 1940, the bank ceased to do business. Its assets, including the Alker note, the insurance policies, assignment of the unpaid fees along with all the other collateral held by the bank were all assigned to the Respond-

ent, which had insured the deposits of the Bank. Alker thereafter paid the interest on the loan to Respondent as assignee at the rate of 5%, amounting to over $25,000.00 a year. The Respondent accepted and retained the same, regularly giving its receipts therefor. Alker has continued to pay the insurance premiums amounting to over $5,000.00 a year for the benefit of the Federal Deposit Insurance Corporation, assignee, and the insurance is still in force.

Respondent shortly thereafter in reviewing the assets of the bank, checked up on the agreement, interviewing Alker and Mr. Fisher, a director of the bank who was familiar with the transaction.

Late in 1942, while Alker was seriously ill in a hospital, the Respondent sought to transfer the DuBan National Dairy stock pledged as collateral to its own name. Alker protested that such was contrary to the oral agreement. Then on November 21, 1942, the Respondent for the first time demanded that the note dated December 11, 1936 be paid in full. Alker again protested, claiming, there being no default in the agreement, that any such demand at that time was contrary to the agreement, but Respondent insisted. The note was not paid. The Respondent thereupon went through the form of a private sale to itself on January 23, 1943, of a large part of the collateral for the sum of $358,336.50, on the second floor rear of the Respondent's premises with only two of its own clerks present.

Many of the various securities the Federal Deposit Insurance Corporation sold to itself for a nominal value of $1. per lot. Today these securities are considerably higher in value, and the prices of all the collateral have risen to such an extent that, if the Federal Deposit Insurance Corporation had abided by the oral agreement, the note could have been paid off in full, and all the equity in the collateral could have been returned to each of the parties concerned. Alker and DuBan denied the validity of the alleged sale and demanded that the Respondent perform the agreement,

in which there was no default, and National Dairy refused to transfer the DuBan stock.

The Respondent thereupon instituted this action in equity. By this time Alker had paid back to the Trust Company and the Respondent well over $400,000.00.

The Respondent in its pleadings did not allege anything illegal, fraudulent, improper or secretive in connection with this transaction or any phase thereof. The District Court found that there was no fraud involved in the transaction, but decided for the Respondent.

On appeal the Circuit Court of Appeals affirmed the judgment of the District Court.

The principal questions involved on said appeal were:

I. Did the Chancellor err in his interpretation of the law of contracts as to when agreements are unenforceable because of a lack of definiteness and certainty?

II. Did the Chancellor err in ruling that the agreement was unenforceable because of lack of proof?

III. Did the Trial Court err in holding that the principal issue raised by the evidence was one of fact?

IV. Did the Chancellor err in failing to make separate findings of fact and separate conclusions of law?

These questions were not decided by said Circuit Court of Appeals, the said Circuit Court of Appeals erroneously affirming the judgment of the District Court for the following reasons:

(1) The Court held the contract to be a secret agreement within the ruling of the D'Oench Duhme & Co. case;

(2) The Court held the contract unenforceable against Federal Deposit Insurance Corporation because of the provisions of 12 U. S. C. A. 264 (s).

Jurisdictional Statement.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of Congress approved February 13, 1925, C. 229, Sec. 1, 43 Stat. 938; 28 U. S. C. A. 347 (a).

Judgment was entered in this case by the Circuit Court of Appeals on November 7, 1945 and a petition for rehearing was denied on December 12, 1945.

Questions Presented.

1. Is an oral agreement fixing the maturity of a demand collateral note, for valuable consideration, a "secret" "agreement," within the meaning of the decision of this Court In *D'Oench, Duhme & Co., Inc. v. Federal Deposit Insurance Corporation,* 315 U. S. 447, so that it may not be enforced against the Federal Deposit Insurance Corporation which took the demand note more than three years after its date and failed to demand its payment until almost six years after its date?

2. Is this case controlled by the decision of this Court in *D'Oench, Duhme & Co., Inc. v. Federal Deposit Insurance Corporation,* 315 U. S. 447?

3. Do the provisions of Section 12B (s) of the Federal Reserve Act, 12 U. S. C. A. Sec. 264 (s) have any application to this case?

4. Did not the Circuit Court of Appeals for the Third Circuit err in affirming the judgment in favor of F. D. I. C. on the theory of a "secret agreement" when the F. D. I. C. did not allege in its pleadings any such "secret agreement," fraud, deception or attempt to mislead anyone, nor was there any evidence offered by the F. D. I. C. to that effect?

5. Did not the Circuit Court of Appeals for the Third Circuit err in finding there was a "secret" agreement and fraud in the face of an expressed finding by the District Court that there was no fraud and no secret agreement?

6. Was the sale conducted in the second story back room of the respondent's office by one of its employees to another of securities whose real value was very large, a valid sale?

7. Did not the United States Circuit Court of Appeals for the Third Circuit err in affirming the trial court's decision which decided an important question of fundamental law in disregard of the applicable provisions of the Pennsylvania Negotiable Instruments Law and contrary to the established decisions of the courts of Pennsylvania which have been followed by this circuit and district.

8. Did not the Circuit Court of Appeals for the Third Circuit err in affirming the decision of the District Court in disregard of the error of the District Court in holding the contract unenforceable because of indefiniteness?

9. Did not the Circuit Court of Appeals for the Third Circuit err in failing to consider the errors committed by the District Court in ruling the agreement unenforceable because of lack of proof and in refusing to admit certain affidavits?

10. In the interest of brevity (Rule 38, par. 2; and *Furness, Withy & Co., Ltd. v. Yang Tsze Insurance Association, Ltd., et. al.*, 242 U. S. 409), petitioners do not at this time set forth all of the questions which will be argued in the argument on the merits of this cause should the certiorari be granted, nor all the contentions in support of such questions, but in order to comply with the rule of this court requiring that all issues upon which decision is requested be presented in the petition for certiorari (*Grening v. Cooley*, 281 U. S. 90, 98) petitioners here refer to and incorporate into this petition all of the matters presented

in its statement of questions involved relied upon in the appeal to the United States Circuit Court of Appeals for the Third Circuit with the same force and effect as if herein set out in full.

Reasons Relied Upon For Allowance of Writ.

1. The United States Circuit Court of Appeals for the Third Circuit has misconstrued and wrongfully applied the decision of this court in *D'Oench, Duhme & Co., Inc. v. Federal Deposit Insurance Corporation,* 315 U. S. 447, extending it to a situation in no way within the scope of that decision, the facts being entirely different.

D'Oench, Duhme & Co., v. F. D. I. C., 315 U. S. 447.

2. The United States Circuit Court of Appeals for the Third Circuit has decided an important question of fundamental law in conflict with a decision of the United States Supreme Court.

Deitrick v. Standard Surety Company, 303 U. S. 471.

3. The United States Circuit Court of Appeals for the Third Circuit has decided an important question of fundamental law on a theory which was not alleged or set forth in any of the pleadings, and as to which the Respondent offered no evidence.

THEORY OF "SECRET AGREEMENT."

4. The United States Circuit Court of Appeals for the Third Circuit has, in relying upon Section 12B (s) of the Federal Reserve Act, Section 12 U. S. C. A. Section 264 (s) in support of its conclusion, misconstrued an important Federal statute in a way in conflict with applicable decisions of this court.

5. The United States Circuit Court of Appeals for the Third Circuit has decided an important question of law

on the theory that the contract was fraudulent and illegal despite the express finding by the District Court that there was no fraud or illegality in the transaction.

32nd Request for Findings of Act—Record 502 (a) approved in the Trial Court's opinion, Record 475 (a).

6. The United States Circuit Court of Appeals for the Third Circuit by affirming the trial court's decision has decided an important question of fundamental law in disregard of the applicable provisions of the Pennsylvania Negotiable Instruments Law and contrary to the established decisions of the courts of Pennsylvania which have been followed by this circuit and district.

In re Redmond, 15 Fed. Supp. 923.
Pa. Act of May 16, 1901, P. L. 194, Section 53, 56 Purdon 133.

7. The United States Circuit Court of Appeals for the Third Circuit has completely ignored the equities of the petitioners by permitting the respondent to retain the benefits of the agreement, but holding the respondent was not bound thereby.

8. The Circuit Court of Appeals for the Third Circuit erred in affirming the decision of the District Court in disregard of the error of the District Court in holding the contract unenforceable because of indefiniteness.

9. The Circuit Court of Appeals for the Third Circuit erred in failing to consider the errors committed by the District Court in ruling the agreement was unenforceable because of lack of proof, and in refusing to admit certain evidence.

Prayer For Writ.

WHEREFORE your petitioners pray that a writ of certiorari issue, under the seal of this Court, directed to the United States Circuit Court of Appeals for the Third Cir-

cuit, commanding said Court to certify and send to this Court for its review a full and complete transcript of the record and the proceedings of the said United States Circuit Court of Appeals in the case at bar and entitled on its Docket, No. 8805, Harry J. Alker, Jr., Mamie DuBan, Individually and as Executrix of the Estate of Alfred A. DuBan, deceased, Appellants, versus Federal Deposit Insurance Corporation, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of the said United States Circuit Court of Appeals for the Third Circuit may be reversed by the Court, and for such further relief as this Court may deem proper.

And your petitioners will ever pray.

Harry J. Alker, Jr.,
Mamie DuBan,
Individually, and as Executrix of the Estate of Alfred A. DuBan, deceased,

By Edwin Hall, II,
A. D. Bruce,
Harry J. Alker, Jr.,
Allen J. Levin,
Stanley Folz,
Counsel for Petitioners.